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No. 02-661

IN THE
Supreme Court of the United States

IN RE FEDERAL-MOGUL GLOBAL, INC.

DAIMLERCHRYSLER CORPORATION,
FORD MOTOR COMPANY, and
GENERAL MOTORS CORPORATION,

Petitioners,

v.

OFFICIAL COMMITTEE OF ASBESTOS CLAIMANTS, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MOTION OF 3M COMPANY FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

BRUCE R. ZIRINSKY
Counsel of Record
JOHN H. BAE
JOSEPH E. FIELD
CADWALADER,
WICKERSHAM & TAFT
Counsel for Amicus Curiae
100 Maiden Lane
New York, NY 10038
(212) 504-6000

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

31 pp

MOTION FOR LEAVE TO FILE BRIEF OF *AMICUS CURIAE*

3M Company, by its counsel, moves pursuant to Rule 37.2 of the rules of the Supreme Court of the United States, for leave to file the annexed brief as *amicus curiae* in support of the petition for a *writ of certiorari* to the United States Court of Appeals for the Third Circuit. The petitioners, who filed the petition for a *writ of certiorari* on October 29, 2002, have consented to the filing of this brief. *Amicus* was not able to secure the consent of all respondents. A copy of the proposed *amicus* brief is attached hereto.

As set forth in the statement of interest contained in the brief, the *amicus* has been named as a defendant with one or more of the petitioners and Federal-Mogul Global, Inc. (the "Debtor") in asbestos personal injury cases pending throughout the United States. As alleged joint tortfeasors in the underlying asbestos actions, the litigation of asbestos claims against the *amicus* will give rise to indemnification and contribution claims against the Debtor and other manufacturers of asbestos products. Thus, the *amicus* is a direct beneficiary of any trust that may be established under section 524(g) of title 11 of the United States Code and any plan of reorganization approved in the Debtor's chapter 11 case. As such, the *amicus* has a direct and vital interest in the issues presented to the Court — the Third Circuit's jurisdiction to review an order denying the petitioners' motion to transfer, and the scope of federal courts' jurisdiction over proceedings related to a chapter 11 case within the meaning of 28 U.S.C. § 1334(b).

The *amicus* supports the petition for a *writ of certiorari* which seeks review of the Third Circuit's decision in *In re Federal-Mogul Global, Inc.*, 300 F.3d 368 (3d Cir. July 31, 2002). In that decision, the Third Circuit refused to exercise appellate jurisdiction over the petitioners' appeal of the District Court's denial of their motion to transfer, and in reviewing the District Court's order on a mandamus standard, the Third Circuit articulated an overly restrictive and unworkable definition of federal "related to" jurisdiction that all but eliminated federal "related to" jurisdiction over litigation among nondebtors.

The Third Circuit erred in both respects. In refusing to exercise appellate jurisdiction over the District Court's order, the Third Circuit failed to apply the collateral order doctrine first enunciated by the Court in *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949), and adopted by every circuit court of appeals. Presented with facts very similar to those presented here, the Sixth Circuit in *Lindsey v. O'Brien, Tanski, Tanzer & Young Health Care Providers of Connecticut (In Re Dow Corning Corp.)*, 86 F.3d 482 (6th Cir. 1996), exercised appellate jurisdiction based on the collateral order doctrine.

Likewise, the Third Circuit's construction of federal "related to" jurisdiction as requiring an "automatic effect" upon the estate "without the intervention of yet another lawsuit" is in direct conflict with the Court's decision in *Celotex Corp. v. Edwards*, 514 U.S. 300, 307-08 (1995), as well as the decisions of the Fifth, Sixth, Seventh and Eighth Circuits. By its decision, the Third Circuit closed the door on the only avenue available to federal courts to centralize matters related to a bankruptcy case in one forum. The petitioners' brief does not address in depth the impact of the Third Circuit's narrow construction of federal

"related to" jurisdiction upon the nationwide asbestos litigation crisis. The a*micus* respectfully submits that its brief will assist the Court in ruling on the petition for *writ of certiorari*.*

For these reasons, the *amicus* respectfully requests that the Court grant it leave to file the attached brief in support of the petition for a *writ of certiorari*.

Respectfully submitted,

BRUCE R. ZIRINSKY
Counsel of Record
JOHN H. BAE
JOSEPH E. FIELD
CADWALADER,
WICKERSHAM & TAFT
Counsel for Amicus Curiae
100 Maiden Lane
New York, NY 10038
(212) 504-6000

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* The Court has the discretion to entertain relevant arguments presented by the *amicus*, even where those arguments were not raised by the parties. *Teague v. Lane*, 489 U.S. 288, 300 (1989). *See also Mapp v. Ohio*, 367 U.S. 643, 673 n.5 (1949) (Court's holding was not based on argument contained in the appellant's brief, but upon a request made in the *amici* brief submitted by the American and Ohio Civil Liberties Unions) (Harlan, J. dissenting).

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INTEREST OF *AMICUS CURIAE*

3M Company, by its counsel, file this brief as *amicus curiae*.[1] The *amicus* was not able to secure the consent from all parties to file this brief. Accordingly, the *amicus* is filing this brief pursuant to Rule 37.2(b) of this Court.

The *amicus* has been named as a defendant with one or more of the petitioners and Federal-Mogul Global, Inc. ("the Debtor") in asbestos personal injury cases pending throughout the United States. As an alleged joint tortfeasor in these actions, the litigation of asbestos claims against the *amicus* will give rise to indemnification and contribution claims against the Debtor and other manufacturers of asbestos products. Thus, the *amicus* is a direct beneficiary of any trust established under section 524(g) of title 11 of the United States Code (the "Bankruptcy Code") in the Debtor's chapter 11 case. Allowing the asbestos claims against the *amicus* and the resulting indemnification and contribution claims against the Debtor to proceed separately from the plaintiffs' asbestos claims against the Debtor will be extremely inefficient and expensive for all parties. Identical and related factual and legal issues will have to be resolved thousands of times in different courts at great expense, while risking inconsistent rulings by courts on identical issues. On the other hand, resolving all related asbestos claims together in the same forum will enable the Debtor to properly deal with the claims of the *amicus* along with all other claims against the estate

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1. This brief was not authored, in whole or in part, by counsel to a party and no contribution to its preparation or submission was made by any person or entity other than the *amicus curiae* and its counsel.

in any plan of reorganization and section 524(g) trust approved in its chapter 11 case.

For these reasons, the *amicus* has a direct and vital interest in the issues presented to the Court — the jurisdiction of the United States Court of Appeals for the Third Circuit to review an order denying the petitioners' motion to transfer, and the scope of federal courts' jurisdiction over proceedings "related to" a chapter 11 case within the meaning of 28 U.S.C. § 1334(b).

The *amicus* supports the petitioners' petition for a *writ of certiorari*, and submits that the Third Circuit erred in ruling that it lacked appellate jurisdiction to review the District Court's denial of the petitioners' motion to transfer, and in applying a restrictive definition of "related to" jurisdiction that conflicts with the prior decision of the Court as well as the decisions of other circuit courts of appeals. The *amicus* also submits this brief to impress upon the Court the critical need for a centralized resolution of what this Court has described as the "elephantine mass" of asbestos cases pending in the courts.

SUMMARY OF ARGUMENT

The asbestos litigation was once comprised of claims by workers who had been seriously injured or had died as a result of direct, substantial exposure to asbestos. These claims involving disabling or fatal asbestos-related diseases are now dwarfed by the tens of thousands of lawsuits filed each year by individuals with indirect, limited exposure to asbestos who are not, by any common sense definition of the word, "sick." As numerous companies that were directly involved

with the manufacture or sale of products containing asbestos have filed for bankruptcy protection, the plaintiffs have expanded the universe of defendants to include any and every company that had any connection, however remote, with the manufacture, sale or use of any kind of product that contained or was used in conjunction with asbestos.

The cumulative number of these highly questionable claims has driven over 60 companies to seek protection under the Bankruptcy Code, more than 20 in the last two years alone. None of those companies has professed an inability to pay fair compensation to the truly sick. All have attributed their bankruptcies to the ever-growing number of unimpaired claimants who continue to file claims each year in carefully selected state court jurisdictions.

The petitioners and the *amicus* are among the newer defendants that have been brought into this ever-expanding asbestos litigation. By their transfer motion under 28 U.S.C. § 157(b)(5), the petitioners asked the District Court below to utilize the only vehicle available to federal courts to transfer cases pending in both federal and state courts throughout the United States to a single forum for a centralized and efficient resolution. The District Court denied that motion, based on its ruling that it lacked "related to" jurisdiction over the claims against the petitioners. On appeal, the Third Circuit ruled that it lacked appellate jurisdiction to review the District Court's denial of the transfer motion. The Third Circuit also held that, on a mandamus review standard, the District Court did not err in ruling that the asbestos claims asserted against the petitioners are not "related to" the Debtor's chapter 11 case.

The Third Circuit erred in both respects. The Third Circuit's failure to exercise appellate jurisdiction cannot be reconciled with the Court's collateral order doctrine articulated in *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949), that has been adopted by every other circuit court of appeals. Likewise, the Third Circuit's narrow construction of federal "related to" jurisdiction is in direct conflict with the Court's decision in *Celotex Corp. v. Edwards*, 514 U.S. 300, 307-08 (1995), as well as the decisions of the Sixth Circuit in *Lindsey v. O'Brien, Tanski, Tanzer & Young Health Care Providers of Connecticut (In re Dow Corning Corp.)*, 86 F.3d 482 (6th Cir. 1996), the Fifth Circuit in *Wood v. Wood (In re Wood)*, 825 F.2d 90, 94 (5th Cir. 1987), the Eight Circuit in *Kocher v. Dow Chemical Co.*, 132 F.3d 1225, 1231 (8th Cir. 1997), and the Seventh Circuit in *In re FedPak Sys., Inc.*, 80 F.3d 207 (7th Cir. 1996). For these reasons, the *amicus* respectfully submits that the Court should grant the petition for a *writ of certiorari*.

ARGUMENT

I.

THE THIRD CIRCUIT ERRED IN REFUSING TO EXERCISE APPELLATE JURISDICTION OVER THE ORDER DENYING THE TRANSFER MOTION

The Third Circuit below erred in ruling that it lacked appellate jurisdiction to review the District Court's order denying the petitioners' transfer motion. *In re Federal-Mogul Global, Inc.*, 300 F.3d 368, 378-79 (3d Cir. July 31, 2002). This ruling failed to apply the collateral order doctrine enunciated by the Court in *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949), and is in direct conflict with the decisions of other courts of appeals.

In *Cohen*, the Court established the collateral order doctrine, and held that an appellate court may exercise appellate jurisdiction over an interlocutory order where a decision "finally determine[s] claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." *Id.* at 546. The Court also noted that the policy of avoiding piecemeal appeals was outweighed by the need to permit appellate review of important issues:

> But this order of the District Court did not make any step toward final disposition of the merits of the case and will not be merged in final judgment. When that time comes, it will be too late effectively to review the present order and the rights conferred by the statute, if it is applicable, will have been lost, probably irreparably.

Id. at 546.

Consistent with *Cohen*, every circuit court of appeals has exercised appellate jurisdiction over interlocutory orders based on the collateral order doctrine. *See, e.g.*, *Autoridad De Energia Electrica De Puerto Rico v. Ericsson Inc.*, 201 F.3d 15, 17 (1st Cir. 2000) (employing collateral order doctrine); *United States v. Ramirez*, 297 F.3d 185, 190 (2d Cir. 2002) (same); *United States v. Scarfo*, 263 F.3d 80, 87 (3d Cir. 2001) (same); *Gould v. Davis*, 165 F.3d 265, 268 (4th Cir. 1998) (same); *Clark v. Johnson*, 278 F.3d 459, 460-61 (5th Cir. 2002) (same); *Lindsey v. O'Brien, Tanski, Tanzer & Young Health Care Providers of Connecticut (In re Dow Corning Corp.)*, 86 F.3d 482, 488 (6th Cir. 1996) (same), *cert. denied*, 519 U.S. 1071 (1997); *Williams v. Katz*, 23 F.3d

190, 192 (7th Cir. 1994) (same); *Maitland v. Univ. of Minnesota*, 260 F.3d 959, 962 (8th Cir. 2001) (same), *cert. denied*, 122 S. Ct. 1300 (2002); *Curry v. Castillo (In re Castillo)*, 297 F.3d 940, 946 (9th Cir. 2002) (same); *Timpanogos Tribe v. Conway*, 286 F.3d 1195, 1199-1200 (10th Cir. 2002) (same); *Aquamar S.A. v. Del Monte Fresh Produce N.A., Inc.*, 179 F.3d 1279, 1287 (11th Cir. 1999) (same); *United States v. Durenberger*, 48 F.3d 1239, 1241-42 (D.C. Cir. 1995) (same).

The collateral order doctrine is clearly applicable to the facts presented in this case. The District Court's order denying the petitioners' transfer motion conclusively determined that the petitioners' asbestos cases are not "related to" the Debtor's chapter 11 case. The order does not deal with the merits of the underlying action, and unquestionably is separable from and collateral to the issues raised in the action. Thus, the order will not be merged into a final judgment rendered in the case, and absent an interlocutory appeal, the order will never be subject to appellate review at the conclusion of the case on the merits. Moreover, for the reasons discussed in Point II, *infra*, the issue of whether the asbestos cases should be transferred to the District Court also raises issues that are too important to be denied appellate review.

Under similar circumstances, the Sixth Circuit in *Dow Corning Corp.* found that the interlocutory order denying similar motions to transfer as the motions filed in the District Court below was appealable under the collateral order doctrine. The Sixth Circuit stated:

> The district court's order conclusively determines that claims pending against the nondebtor

> defendants are not "related to" Dow Corning's bankruptcy proceeding for purposes of Section 1334(b). In addition, resolution of the "related to" jurisdictional question does not involve consideration of the merits of the pending tort claims. Finally, due to the unique circumstances of this case and the hardship that would inevitably result if we were to refrain from addressing the issues presented by this appeal at this time, the issues presented will be effectively unreviewable after a final judgment is rendered.

Dow Corning Corp., 86 F.3d at 488.

Thus, the Third Circuit erred in failing to exercise appellate jurisdiction over the District Court's order denying the motion to transfer. The Third Circuit's decision is directly contrary to the Court's decision in *Cohen* and conflicts with the decisions of every circuit court of appeals that has addressed the issue. As such, the Court should grant the petition for *writ of certiorari* and reverse the Third Circuit's decision not to exercise appellate jurisdiction over the District Court's order.

II.

THE THIRD CIRCUIT MISINTERPRETED THE SCOPE OF FEDERAL "RELATED TO" JURISDICTION

While the Third Circuit stated that it remained a "step away" from addressing whether the District Court below has "related to" jurisdiction over the asbestos claims asserted against the petitioners, it nevertheless reviewed the lower court's order on a mandamus review standard. In so doing, the Third Circuit interpreted the "conceivable effect" test articulated in *Pacor, Inc. v. Higgins*, 743 F.2d 984 (3d Cir. 1984), and adopted by the Court in *Celotex Corp. v. Edwards*, 514 U.S. 300, 307-08 (1995), as requiring that a proceeding between nondebtors must have

an "automatic" effect upon the estate, without the "intervention of yet another lawsuit." *Federal-Mogul*, 300 F.3d at 382. That ruling is in direct conflict with the Court's decision in *Celotex* as well as decisions of other courts of appeals. The *amicus* submits that the scope of federal related to jurisdiction is an issue of significance that should be subject to a uniform standard. For these reasons, as detailed below, the Court should grant the petition for *writ of certiorari*.

A. The Third Circuit's Definition of "Related to" Jurisdiction is in Direct Conflict with *Celotex* and Decisions of Other Circuit Courts

Federal jurisdiction over claims and causes of action related to a chapter 11 case is extremely broad. Section 1334(b) of title 28 of the United States Code provides district courts with jurisdiction over "all civil proceedings arising under title 11, or arising in or related to a case under title 11." The Court in *Celotex* explained the breadth of federal "related to" jurisdiction:

> Congress did not delineate the scope of "related to" jurisdiction, but its choice of words suggests a grant of some breadth. The jurisdictional grant in § 1334(b) was a distinct departure from the jurisdiction conferred under previous Acts, which had been limited to either possession of property by the debtor or consent as a basis for jurisdiction. . . . [C]ongress intended to grant comprehensive jurisdiction to the bankruptcy courts so that they might deal efficiently and expeditiously with all matters connected with the bankruptcy estate.

Celotex Corp. v. Edwards, 514 U.S. 300, 307-08 (1995) (internal footnotes and citations omitted). In adopting the "conceivable effect" test, the Court stated, "The usual articulation of the test for determining whether a civil proceeding is related to bankruptcy is whether the outcome of that proceeding could

conceivably have any effect on the estate being administered in bankruptcy." *Id.* (citing *Pacor*, 743 F.2d at 994). The Court defined an action as having a "conceivable effect" on the estate if the outcome of the action "could alter the debtor's rights, liabilities, options, or freedom of action (either positively or negatively) and which in any way impacts upon the handling and administration of the bankrupt estate." *Id.* The Court expressly stated that "proceeding[s] need not necessarily be against the debtor or against the debtor's property" to be "related to" a bankruptcy case. *Id.*

Notwithstanding the Court's articulation of the "conceivable effect" test to define the scope of federal "related to" jurisdiction, the Third Circuit below articulated an unworkable, restrictive test that essentially eliminates federal related to jurisdiction over proceedings involving nondebtors. The Third Circuit stated that a proceeding between nondebtors will have a "conceivable effect" upon the estate only if the outcome of that proceeding has an "automatic" effect upon the debtor's estate "without the intervention of yet another lawsuit." *Federal-Mogul*, 300 F.3d at 382.

Under this test, no proceeding among nondebtors could ever be related to a bankruptcy case, because no proceeding among nondebtors will ever have an automatic effect upon the estate without the intervention of another proceeding. Indeed, even in instances where the nondebtor has a contractual indemnity or guaranty right against the debtor — an example the District Court below cited as having an "automatic" effect upon the estate — the nondebtor will still have to take some additional step to enforce that contractual right against the debtor by filing a claim or commencing an adversary proceeding against the debtor. Upon the commencement of that proceeding, the debtor then has the opportunity to contest the nondebtor's indemnification or guaranty right. The Third Circuit's reliance upon the "automatic effect" test is a distinction without a difference.

Whether the underlying indemnification and contribution claims arise through contract or common law, the court will have to adjudicate these liabilities.

Other circuits that have adopted the "conceivable effect" test have refused to adopt such a restrictive definition of "related to" jurisdiction. Faced with facts very similar to those presented here, the United States Court of Appeals for the Sixth Circuit in *Dow Corning* construed section 1334(b) consistently with the Court's ruling in *Celotex*. In *Dow Corning*, like the petitioners here, nondebtor codefendants of debtor Dow Corning filed motions to transfer claims asserted against them arising from the plaintiffs' use of silicone gel breast implants to the district court where Dow Corning's chapter 11 case was pending. In reversing the district court, which ruled that it lacked related to jurisdiction over the claims against the nondebtors, the Sixth Circuit found that "'automatic' liability is not necessarily a prerequisite for a finding of 'related to' jurisdiction." *Dow Corning*, 86 F.3d at 491. The court explained that "[t]he potential for . . . [the debtor] being held liable to the nondebtors in claims for contribution and indemnification, or vice versa, suffices to establish a conceivable impact on the estate in bankruptcy." *Id.* at 494.

The Fifth Circuit in *Wood v. Wood (In re Wood)*, 825 F.2d 90, 94 (5th Cir. 1987), similarly refused to require an "automatic effect" upon the estate as it held that claims asserted against nondebtors based on joint conduct with the debtor were related to the debtor's bankruptcy case. The court stated, "We find support in the Court of Appeals for the Sixth Circuit and lower courts, which have held that when the plaintiff alleges liability resulting from the joint conduct of the debtor and non-debtor defendants, bankruptcy jurisdiction exists over all claims under section 1334." *Id.* (citing *In re Salem Mortgage Co.*, 783 F.2d 626, 634 (6th Cir. 1986); *In re Zamost*, 7 B.R. 859 (Bankr. S.D. Cal. 1980)).

Likewise, the Eight Circuit in *Kocher v. Dow Chemical Co.*, 132 F.3d 1225, 1231 (8th Cir. 1997), found that the district court had "related to" jurisdiction over plaintiffs' claims against nondebtors based on the nondebtors' "potential indemnification claims against" the debtor. The court stated, "Kocher's claims against [nondebtors] Dow Chemical and DuPont conceivably could affect Dow Corning's bankruptcy estate and thus are 'related to' the bankruptcy case." *Id.*

The Seventh Circuit has refused to follow the *Pacor* test altogether. For example, in *In re FedPak Sys., Inc.*, 80 F.3d 207 (7th Cir. 1996), the Seventh Circuit rejected the conceivable effect test:

> Some courts have adopted a sweeping test which holds that whenever a proceeding "could conceivably have any effect on the bankruptcy estate" it is related to a case under title 11 and the bankruptcy court has jurisdiction. *See, e.g., Pacor, Inc. v. Higgins*, 743 F.2d 984, 994 (3d Cir. 1984). This circuit has adopted a more limited and, we believe, more helpful definition of the bankruptcy court's related to jurisdiction. Our precedents hold that "a case is related to a bankruptcy case where the dispute affects the amount of property available for distribution (i.e., the debtor's estate) or the allocation of property among creditors".

FedPak, 80 F.3d at 213-14 (citations omitted).

In applying this test, courts within the Seventh Circuit found related to jurisdiction over litigation among nondebtors based on the fact that the nondebtor asserted indemnification claims against the debtor, and the courts specifically rejected the need for an "automatic" effect. In *Apex Inv. Assocs., Inc. v. TJX Companies, Inc.*, the court stated:

> Apex also argues that even if TJX is entitled to indemnity, there can be no effect on the bankruptcy

> estate until Apex recovers a judgment against TJX, and TJX then files a claim against Ames. This argument is unavailing. Even if Apex is correct in arguing that this case cannot actually affect the estate until TJX pays Apex, it does not follow that the instant case is not "related to" the bankruptcy proceeding.

121 B.R. 522, 526 (N.D. Ill. 1990). Similarly, in *Salem Mills, Inc. v. Wisconsin Tool & Stamping Co.* (*In re Salem Mills, Inc.*), 148 B.R. 505 (Bankr. N.D. Ill. 1992), the court found related to jurisdiction over litigation among nondebtors based on the fact that the nondebtor filed a proof of claim against the debtor. The court stated, "Wisconsin Tool has filed a proof of claim based upon the indemnity agreement. Consequently, Wisconsin Tool's third-party action is related to the underlying bankruptcy case even though the Debtor is no longer a party litigant." *Id.* at 510.

In sum, the circuits have not adopted a uniform definition of federal "related to" jurisdiction. Most importantly, the rigid "automatic effect" test articulated by the Third Circuit below is not workable, and is in direct conflict with *Celotex* and the decisions of the Fifth, Sixth, Seventh and Eighth Circuits.

B. Federal "Related to" Jurisdiction and its Broad Scope Enable All Matters Related to a Bankruptcy Case to be Consolidated in a Single Forum for an Efficient and Effective Resolution

The breadth of federal "related to" jurisdiction and the authority under section 157(b)(5) of the district court sitting in bankruptcy to centralize all personal injury and wrongful death claims in one forum provide a unique opportunity to federal courts to both enhance the debtor's efforts to reorganize and to help solve the problems posed by the "elephantine mass of asbestos cases." *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 821 (1999). By adopting a restrictive definition of federal "related

to" jurisdiction that all but eliminates bankruptcy jurisdiction over proceedings among nondebtors, the Third Circuit foreclosed the availability of section 157(b)(5) to centralize all personal injury and wrongful death claims related to a bankruptcy case.[2]

Centralization of related claims serves dual purposes:

- To conserve judicial resources by permitting one court (not thousands) to preside over actions involving common facts and legal issues; and
- to conserve the resources of all parties involved in order either to ensure maximum return to creditors if liability is determined or to protect defendants from overwhelming defense costs if liability is not found.

The Fourth Circuit in *A.H. Robins Co., Inc. v. Piccinin* described the importance of centralizing mass tort claims to the ultimate goal of a bankruptcy case, which is confirming a plan of reorganization:

> [T]here are very real considerations that support a centralization of all the Dalkon Shield claims, at least at first, in the district court having jurisdiction of the bankruptcy. The "single focal point" of this proceeding is the development of a reasonable plan of reorganization for the debtor, one which will work

2. Section 157(b)(5) provides:

> The district court shall order that personal injury tort and wrongful death claims shall be tried in the district court in which the bankruptcy case is pending, or in the district court in the district in which the claim arose, as determined by the district court in which the bankruptcy case is pending.

28 U.S.C. § 157(b)(5).

> a rehabilitation of the debtor and at the same time assure fair and non-preferential resolution of the Dalkon Shield claims.

788 F.2d 994, 1011 (4th Cir. 1986) (citations omitted).[3]

The plain language of section 157(b)(5) reflects Congress' recognition of the importance of centralization as it states that the district court *shall* determine the venue for all personal injury and wrongful death claims related to the chapter 11 case, including cases pending in state court. "Section 157(b)(5) bestows upon the district court authority to transfer actions pending in state court." *Calumet Nat'l. Bank v. Levine*, 179 B.R. 117, 122 n.7 (N.D. Ind. 1995). The "plain language" of the statute authorizes the district courts to so act. *Murray v. Pan American World Airways, Inc. (In re Pan Am Corp.)*, 16 F.3d 513, 516 (2d Cir. 1994) ("the plain language of section 157(b)(5) authorized the district court to transfer [the] cases from Florida state court" to the district court). Accordingly, a party seeking to invoke the district court's power to transfer a personal injury or wrongful death action pending in state court need not first seek removal of the state litigation to federal court. *See, e.g., Beckwith v. U.S. Lines, Inc. (In re United States Lines, Inc.)*, No. 90 M 47(MP), 1990 WL 451981, at *1 (S.D.N.Y. Nov. 6, 1990) (authorizing transfer of nine state court cases directly to the federal district court pursuant to section 157(b)(5)); *In re Federal Press Co.*, 117 B.R. 942, 951 (Bankr. N.D. Ind. 1989) (bankruptcy court recommended that the district court transfer state cause of action directly to district court pursuant to section 157(b)(5)).

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3. These advantages of consolidating personal injury actions related to a bankruptcy case have been confirmed repeatedly. *See Murray v. Pan American World Airways, Inc.* (*In re Pan Am Corp.*), 16 F.3d 513, 516 (2d Cir. 1994); *Calumet Nat'l Bank v. Levine*, 179 B.R. 117, 120-21, 123 (N.D. Ind. 1995); *Newton v. Johns-Manville Corp.* (*In re Johns-Manville Corp.*), 45 B.R. 827 (S.D.N.Y. 1984).

By centralizing all related asbestos claims in one court, the debtor can properly deal with all related claims in a single plan of reorganization. Failure to consider all aspects of a bankruptcy case, including the contribution and indemnification claims of codefendants, could severely compromise the debtor's ability to effectively deal with its creditors. Indeed, the Eastern and Southern Districts of New York, conducting joint hearings in an effort to rehabilitate the *Manville* asbestos liability trust years after Manville emerged from chapter 11, identified the failure of the *Manville* plan to deal effectively with claims of nondebtor codefendants as one cause of the trust's fiscal demise. *In re Joint E. & S. Dist. Asbestos Litig.*, 129 B.R. 710, 732-33 (E.D.N.Y. & S.D.N.Y. 1991). The court noted that litigation involving claims by the codefendants and other claimants to the trust "present the most difficult issues in resolving this class action." *Id.* at 733. Centralizing all claims related to the chapter 11 case will avoid such problems and will enable the parties to address all matters related to the debtor's chapter 11 case in a coordinated and efficient manner.

The experiences in *A.H. Robins*, the Dalkon Shield mass tort case, and in *Drexel Burnham Lambert*, a mass financial tort bankruptcy case, evidence the benefits of successfully dealing with all claims, including the channeling of claims for contribution, reimbursement or indemnification by nondebtor codefendants into claims against a trust created for the benefit of creditors. *See In re Drexel Burnham Lambert Group Inc.*, 138 B.R. 723, 753 (Bankr. S.D.N.Y. 1992); *Securities and Exchange Commission v. The Drexel Burnham Lambert Group (In re Drexel Burnham Lambert Group, Inc.)*, 960 F.2d 285, 292 (2d Cir. 1992) (in each case, describing the channeling injunctions that were central to the debtor's chapter 11 plan), *cert. dismissed*, 506 U.S. 1088 (1993).

The congressional purpose underlying the breadth of "related to" jurisdiction and section 157(b)(5) — to eliminate the multiplicity of forums for the adjudication of parts of a bankruptcy case — is especially pertinent in the context of asbestos litigation, where a defendant having absolutely no liability on the merits may become financially impaired as a result of the raw expense of defending against individual actions thousands of times. Here, that raw expense drove the Debtor into chapter 11. The need for centralization in asbestos litigation is further compounded by the fact that most of asbestos cases being filed today are filed by plaintiffs with no impairing asbestos-related illness. While the use of asbestos and asbestos-containing products was dramatically reduced more than 20 years ago, the number of lawsuits filed by plaintiffs claiming that they were injured by asbestos has increased rather than decreased. Currently, there are hundreds of thousands of asbestos cases pending in the courts.[4]

The increasing number of asbestos claims filed by unimpaired claimants has also resulted in the filing of numerous

4. In a recent study, the RAND Institute for Civil Justice, which has been following asbestos litigation since 1984, estimates that 500,000 asbestos claims have been filed and that the number of new claims has risen sharply in recent years. Hensler, *Asbestos Litigation in the U.S.: A New Look at an Old Issue*, p. 2 (Institute for Civil Justice, RAND Corp., Aug. 2001). This study concludes that the number of claims yet to be filed could range from 500,000 to 2.5 million. *Id.* at 14. A decade ago, new asbestos claims were being filed at the rate of 1,000 to 2,000 new claims per month. Brickman, *The Asbestos Litigation Crisis: Is There a Need for an Administrative Alternative?*, 13 Cardozo L. Rev. 1819, 1861 (1992). More recent data shows that over 90,000 new asbestos lawsuits were filed last year, representing an increase of one third from the previous year. Testimony of the Honorable Benjamin Nelson before the United States Senate Committee on the Judiciary-Asbestos Litigation, Sept. 25, 2002; Greenhouse, *Asbestos Appeal Centers on Fear of Cancer*, N.Y. Times, Nov. 7, 2002, at C18, col. 4.

bankruptcies of once-solvent corporate entities. Currently, there are more than 60 bankruptcy cases pending in the United States that have been filed by once healthy corporations as a direct result of the magnitude of asbestos lawsuits. *See* Glater, *Defending a United Detroit on Asbestos*, N.Y. TIMES, Nov. 3, 2002, at sec. 3, col. 1; Roston, *The Asbestos Pit: An Old Issue is Back and the Lawsuits are Killing Shares*, TIME, Mar. 11, 2002. These numbers continue to grow as a result of the continuing stream of asbestos cases. Indeed, in the first seven months of 2002, 12 companies facing significant asbestos liability sought protection under the Bankruptcy Code — more than in any other three year period before 1999. Testimony of the Honorable Benjamin Nelson, United States Senate Committee on the Judiciary-Asbestos Litigation, Sept. 25, 2002. The debtors' filings in many of these cases starkly illustrate the fact that the recent and dramatic influx of claims has left those companies with no other feasible way to resolve their alleged asbestos liability other than seeking protection under the Bankruptcy Code.[5]

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5. *See* Affidavit of David Weinberg, filed in *In re G-I Holdings, Inc.*, Case No. 00-30135 (D.N.J. 2000), sworn to on January 4, 2001 at ¶¶ 7-9:

> [F]aced with a continuous stream of asbestos claims primarily from individuals who show no asbestos-related impairment, and the recent bankruptcy filings of four other major asbestos defendants, G-I has been forced to succumb to the financial pressure surrounding it and seeks protection from its creditors under chapter 11 of the Bankruptcy Code.

See also Affidavit of David Segal, filed in *In re W.R. Grace & Co., et al.*, Case No. 01-01139 (D. Del. 2001), sworn to on April 2, 2001 at ¶¶ 23-25; Affidavit of William Rodruan, filed in *In re Armstrong World Industries, Inc., et al.*, Case No. 00-4471 (D. Del. 2000), sworn to on Dec. 5, 2000 at ¶ 34 ("in the absence of legislation addressing

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Centralization of claims contemplated by sections 1334(b) and 157(b)(5) provides an avenue to address many of these problems arising from the recent explosion of asbestos litigation. The crippling costs associated with having to litigate essentially the same asbestos case thousands of times in different courts could be eliminated, and procedures could be established to streamline the litigation of common factual and legal issues. Centralization ultimately will benefit the true asbestos victims by preserving the resources of the defendants for the benefit of asbestos claimants with real and enforceable claims. The Fourth Circuit aptly described the concerns to the claimants of not centralizing mass litigation in one forum:

> If the claimants as a whole are to realize reasonable compensation for their claims, it is obviously in the interest of the class of claimants as a whole to obviate the tremendous expense of trying these cases separately. If the bankruptcy court could arrive at a fair estimation of the value of all the claims and

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the challenges faced by asbestos defendants, the chapter 11 process is the only means of fully and finally addressing the merits of the asserted asbestos-related claims. . . ."); Debtors' Motion to Fix Proof of Claim Bar Date and Approving Bar Date Notice Procedures, filed in *In re United States Mineral Products Co.*, Case No. 01-2471 (D. Del. 2001), dated Aug. 1, 2002 at ¶¶ 6-9 (in the year prior to the chapter 11 filing date, the number of claims and the aggregate damages sought, as well as the chapter 11 filing by other co-defendants, strained the debtors' resources "to the point where chapter 11 protection became necessary"); Affidavit of Richard Fleming, filed in *In re USG Corp.*, Case No. 01-2094 (D. Del. 2001), sworn to on June 27, 2001 at ¶ 7 ("these cases have been precipitated by the skyrocketing demands of asbestos plaintiffs in approximately 100,000 pending claims of such plaintiffs against U.S. Gypsum, one of USG's main subsidiaries.").

> submit a fair plan of reorganization based on such estimation, with some mechanism for dispute resolution and acceptable to all interested parties, great benefit to all the claimants could be achieved and the excessive expense of innumerable trials, stretching over an interminable time, could be avoided.

A.H. Robins Co., 788 F.2d at 1013.

In the final analysis, the ability to centralize mass tort actions in one forum provides a unique opportunity to efficiently resolve these cases on a global scale. As the authors of the *Manual For Complex Litigation* (Third) § 31.132 (1995), have recognized, one of the great advantages of consolidating cases through procedures such as federal multidistrict litigation pursuant to 28 U.S.C. § 1407 is that "they bring before a single judge all the cases, parties and counsel comprising the litigation. They therefore afford a unique opportunity for a negotiation for a global settlement." However, because federal multidistrict litigation does not include cases in state court, its effect is blunted where, as here, most of the related cases are pending in state forums. The reach of federal "related to" jurisdiction and the ability to transfer state court actions pursuant to section 157(b)(5) provide a unique remedy for this defect, and have been aptly described by the *Manual* as "[t]he most powerful device for aggregating multiple litigation pending in federal and state courts." *Id.* at 283.

The authority of the Judicial Panel on Multidistrict Litigation to centralize all cases pending in the federal courts reflects a strong and important policy favoring centralization of all cases that are within the jurisdiction of the federal courts. The reach of "related to" jurisdiction under section 1334(b) to claims pending in both federal and state courts reflects the same strong and important policy of centralizing all cases that fall within federal bankruptcy jurisdiction. The authority to

centralize under sections 1334(b) and 157(b)(5) is a tool to facilitate an orderly, efficient resolution of all claims related to a bankruptcy case. Centralization gives the parties the opportunity to arrive at a goal all can agree on: coordinated, efficient and less expensive resolution of claims against the Debtor, the petitioners and other codefendants who have been alleged to be jointly and severally liable to the plaintiffs. *Amicus* submits that, through centralization, common key factual and legal issues may be resolved in a single forum and that it will be possible to develop a fair adjudication process that maximizes both the possibility of a successful reorganization of the Debtor and the fair treatment of all allowed claims. Ultimately, that process is critical to the Debtor's reorganization.

The Third Circuit below failed to consider these issues when it severely limited the reach of federal "related to" jurisdiction by imposing the "automatic effect" requirement. In so doing, the Third Circuit closed the door to the only avenue available to federal courts to centralize, and ultimately, seek to control the asbestos litigation problem.

CONCLUSION

For all of the foregoing reasons, the *amicus* urges the Court to exercise its discretion to grant the petition for *writ of certiorari*.

Respectfully submitted,

BRUCE R. ZIRINSKY
Counsel of Record
JOHN H. BAE
JOSEPH E. FIELD
CADWALADER,
WICKERSHAM & TAFT
Counsel for Amicus Curiae
100 Maiden Lane
New York, NY 10038
(212) 504-6000